

**JOINT AGENCY SUMMARY**  
NORTHWEST HYDROELECTRIC LICENSING WORKSHOP ON  
INTEGRATING STATE PROCESSES

Salt Lake City, Utah  
June 4 & 5, 2002

Participants:

Federal Energy Regulatory Commission  
Alaska Division of Governmental Coordination  
Alaska Department of Fish and Game  
Colorado Department of Public Health and Environment  
Idaho Department of Environmental Quality  
Montana Department of Environmental Quality  
Utah Department of Environmental Quality

## **JOINT AGENCY SUMMARY**

### **NORTHWEST HYDROELECTRIC LICENSING WORKSHOP ON INTEGRATING STATE PROCESSES**

The northwest workshop was held June 4 and 5, 2002, in Salt Lake City, Utah. Representatives from the 401 certifying agencies for Colorado, Idaho, Montana, and Utah attended. The Division of Governmental Coordination, the CZM agency for Alaska, and the Alaska Department of Fish and Game also attended. The Alaska Department of Environmental Conservation, the 401 certifying agency was invited, but declined to attend. Representatives from the Western States Water Council attended as observers. The list of individuals in attendance is attached as Appendix A.

To begin the workshop, Commission staff outlined the FERC licensing process. Staff explained the differences between the Traditional and ALP Processes, as well as FERC's requirements for Section 401 water quality certification and CZMA consistency review. Each state then explained, in some detail, their respective 401 WQC and CZMA processes.

Commission staff identified the goals of the two-day workshop as: (1) familiarize Commission staff with participating states' WQC and CZM processes and programs; (2) familiarize states with FERC's hydro licensing process; and (3) increase efficiency of processes by (a) identifying common attributes and (b) developing potential ways to integrate processes. The following represents a synopsis of the two-day workshop.

#### **FERC LICENSING PROCESS - (Presented by Mark Pawlowski)**

- ! Commission staff explained that the FERC is an independent agency under DOE, and is responsible for licensing the construction and operation of non-federal hydroelectric projects.
- ! FERC was established and derives its authority from the Federal Power Act. FERC jurisdiction over hydropower projects is affected by (a) U.S. lands, (b) navigable waters, and (c) interstate commerce.
- ! FERC is mandated by law to (a) give equal consideration to both developmental and non-developmental resources, (b) ensure that a hydro-power project is best adapted to the comprehensive development plan of a waterway, and (c) conduct an environmental review in accordance with the National Environmental Policy Act.

- ! FERC regulations stipulate that (a) FERC cannot issue a license without state water quality certification or a waiver, and (b) the water quality certificate is considered waived if not acted on within one year of the request for certification.
- ! If a project lies within or affects a state's coastal zone, (a) FERC cannot issue a license without a state's certification that the project is consistent with any applicable coastal zone management program, (b) CZMA requires the state to inform the Commission whether or not a project is consistent within 6 months following commencement of the state review.
- ! The Traditional Licensing Process typically takes about 5-8 years to complete, while the ALP takes about 4 years. Both licensing processes involve at least a 3-year pre-filing consultation period that begins with the issuance of an ICP (Initial Consultation Package), and is characterized by environmental studies and consultation. The Traditional Process is a rigid regulatory process, where additional information is almost always needed after an application has been filed and uncertainty as to environmental enhancements is common. The ALP is a flexible regulatory process that combines the pre-filing consultation and NEPA processes, improves communication among parties, and reduces the need for additional information as well as the uncertainty in the licensing process.
- ! FERC regulations require that the Section 401 WQC, request for 401 WQC, or waiver thereof, be filed along with the license application.
- ! An applicant for hydropower license, whose project lies within a state's coastal zone or affects the state's coastal uses or natural resources, is required to file a consistency certification with the federal licensing agency and the state CZM agency. The timing of this certification is not outlined in FERC's regulations, but typically an applicant files a consistency certification with the state at the time the draft or final license application is filed.
- ! The post-filing processing period is characterized by (a) staff's review of the license application, (b) NEPA scoping and review (includes preparing the environmental analysis), (c) several public notices and meetings, (d) additional information requests, if necessary, and (e) a 10(j) resolution process, if necessary.

## **ALASKA'S CZM AND SECTION 401 PROCESSES ~~Presented by Murrein McCrea~~**

- ! Alaska is not currently issuing WQC's for hydro projects because of funding issues. The state relies on its Alaska Coastal Management Program (ACMP) to apply any CZMA conditions for FERC project licenses.
- ! WQC's may be issued for hydro projects in the future. For projects where WQC's apply, Alaska will not grant a WQC until CZMA consistency is determined.
- ! The ACMP review process is handled by the Division of Governmental Coordination (DGC). The division coordinates conditions for all licensing and permits by federal agencies. The DGC receives comments from the Departments of Environmental Conservation (DEC), Fish and Game (ADF&G), and Natural Resources (DNR) and affected coastal districts and balances the various state interests for hydro projects. Each state resource agency and coastal district gets deference on issues within their expertise.
- ! Thirty-two coastal districts have their own coastal programs that are incorporated into the state ACMP. For districts without a coastal program, the state standards apply.
- ! Alaska has a specific form for requesting a consistency certification and uses one information package for the ACMP and state permits reviews. When a coastal consistency statement is received, the DGC determines whether the package is complete.
- ! Reviews for all state and federal permits required for the same project are handled simultaneously by state review participants as coordinated by the DGC. Also, state permitting agencies simultaneously conduct their reviews under their separate permitting authorities. State permits may be issued only after a CZM consistency determination. With limited exceptions, such as a DNR disposal of a state interest, permits issued by state agencies for the project must be issued within 5 days of a consistency determination by the DGC. Some state permits may expire after one year. Examples of state permits that are on the table concurrently with the FERC license conditions include: ADF&G instream work and fish passage permits, DNR water rights, use of state tide lands, Corps of Engineers Section 404 of the CWA, and Section 10 of the Rivers and Harbors Act.

- ! The ACMP review begins when the consistency package submitted to the DGC is complete. Per the CZM regulations, the state receives a copy of the consistency certification and information (description, coastal effects, information supporting the certification, state permit applications, and evaluation of the state (and coastal district if applicable) enforceable policies. Typically the FERC DEA is the document that completes the consistency package. Prior to receiving the DEA, the state has found that information about the project is not adequate and the project often changes either by new applicant proposals or FERC staff recommendations. Prior to receipt of the DEA, when the FERC issues a notice requesting final terms and conditions, the state will conduct a coordinated review and submit a "preliminary" or "draft" consistency determination to the FERC which is intended to contain all conditions expected to be on the consistency determination, and the conditions are to be as final as possible.
- ! By regulation, there is a 50-day process from receiving a complete package to issuance of a consistency determination. The process can be stopped at day 25 to request additional information, if necessary, but this usually doesn't occur because the state agencies have been involved in the project since pre-filing. On or before day 44, DGC notifies the agencies, applicant, and commenting parties of a proposed consistency determination or any issues to be resolved. If the project is found to be inconsistent, then conditions (called alternative measures) are included to ensure consistency.
- ! Days 45 through 49 allow a 5-day period during which a state agency, applicant, or coastal district notify DGC they concur, or they can request that the determination be elevated to the director-level. Subsequent to a director-level proposed consistency determination, a request may be filed to elevate the determination to the commissioner-level. Upon receipt of a proposed consistency determination, the applicant must sign an agreement with the conditions included in the determination, thereby amending the project. If the applicant does not sign an agreement, the state would issue the final consistency determination as an objection. An objection would preclude state and federal agencies from issuing permits and licenses. An applicant may appeal an inconsistency finding to the U.S. Department of Commerce. If the determination is elevated, a final consistency determination may be issued up to 80 days after the consistency package is complete (receipt of the DEA).
- ! Alaska considers entire projects to be within the scope of its review, including associated facilities such as access roads, helicopter pads, barge

landings, jetties, and transmission lines. Most projects are in remote areas where no roads currently exist, and review of roads may require additional permits. The state considers creating and maintaining access to be a major issue, while FERC puts less emphasis on project access.

- ! Under state law (AS 46.15.145), any individual, organization or agency can file with the Alaska Department of Natural Resources for an instream flow reservation for the benefit of fish and wildlife habitat, migration, and propagation; recreation and parks; navigation and transportation; or sanitation and water quality. Instream flow reservations are often determined by the Tennant method because of the cost of an IFIM study. An instream flow reservation is similar to a consumptive-use water right. An instream water right holder has priority use of that water over people who file later for water rights.
- ! A bill passed the state legislature to establish a state program for licensing projects that are less than 5 megawatts, but regulations to implement the bill have not been promulgated. State agencies are concerned that staffing and funding restrictions will make it difficult to implement the state program.
- ! In Alaska, five hydropower projects are in or beginning FERC relicensing. (Two of the larger projects were developed before statehood.) However, the vast majority of hydroelectric licensing will be new projects. Subsidies, intertie appropriations, and state licensing legislation, combined with energy shortages in the Lower 48, have the potential to dramatically increase the pace, scale and number of hydroelectric project proposals in Alaska. Alaska Department of Community and Regional Affairs, Division of Energy has identified 1,144 potential hydroelectric sites in Alaska. Of this total, 602 of the potential sites likely have a power production capacity under 5 MW. Interties are proposed that will make projects economical that are currently unsuitable for local markets. In 2002, construction of the first phase of the Southeast Alaska Intertie System will begin. Up to \$384 million has been authorized for this system. The U.S. Department of Energy and the Denali Commission provide large grants to villages for hydroelectric projects that would otherwise be uneconomical.

#### **COLORADO'S SECTION 401 PROCESS - (Presented by Andrew Ross)**

- ! All WQC requests must include a copy of the 404 Permit Application, project site plan, and list or description of the best management practices associated with the project. Any additional information accompanying the request is reviewed, but no additional information is requested.

- ! When a request for WQC is received, a notice is posted for 30 days for comments. All of the state's FERC-licensed projects are small, and the notice usually states that the impacts of the project are minimal and includes a preliminary decision to grant or deny the request.
- ! A final WQC is issued after the close of the 30-day comment period. A WQC request has never denied.
- ! WQCs do not usually include any conditions except for best management practices. The state is prohibited from including conditions that affect water rights and this precludes including most other types of conditions.
- ! For the future, Colorado is anticipating more WQC activity. Several sites are now under consideration for unconstructed projects. Additionally, many dams in the state are 90 years old and in need of work. These dams could be rebuilt to add hydropower.

#### **IDAHO'S SECTION 401 PROCESS - (Presented by Doug Conde)**

- ! There is no set policy of what information is needed for WQC requests. This is determined case by case. The DEQ works with applicants and federal agencies to get needed information.
- ! Within approximately 30 days of receipt of a request for WQC, a public notice is issued. The notice is mailed to participants in the pre-filing consultation for the project and published in a newspaper.
- ! Within 90 days of the deadline to issue a WQC, a notice is issued of the DEQ's preliminary decision. If the decision is to issue certification, a copy of the preliminary certification is available to the public. There is a 45 day comment period. If DEQ determines that a public hearing or meeting is appropriate, it is held within the 45 day comment period.
- ! The WQC can be appealed to a citizens board which can change an issued WQC.
- ! Idaho uses the withdrawn/refile procedure often. The alternative, denial without prejudice, is often appealed, creating additional costs for the state.
- ! Idaho may include a reopening condition if TMDLs are not complete by the time the WQC is issued. The state expects to continue issuing open

ended WQC's, even after TMDL's are complete. These may be in the form of adaptive management conditions rather than reopeners.

- ! For projects where DEQ and the applicant reach an agreement, the WQC is sometimes issued as a consent order. As a result, the conditions are enforced by a state court and the state doesn't need to rely on FERC for enforcement.

#### **MONTANA'S SECTION 401 PROCESS - (Presented by Michael Suplee)**

- ! WQC's for FERC projects are generally handled by the Water Quality Standards Section.
- ! Requests for a WQC must be accompanied by specific information, including a description of the facility and operation, quantity and quality of discharge, methods being used or proposed to monitor the quality of the discharge and treatment or control of pollutants.
- ! Upon receipt of a request for a WQC, Montana has 30 days to review the application for adequacy and request additional information. If additional information is not requested within 30 days, the request is deemed to be complete.
- ! Montana issues a notice of the request within 30 days of receipt of request or supplemental material. Notices include tentative decisions and are published in newspapers. If this notice is not issued within 30 days of receiving material for a complete application, the WQC is deemed to be waived under the state's administrative rules.
- ! The public has 30 days to comment on the notice. If there is significant public interest, a hearing is generally held, occurring about mid-way in the comment period.
- ! The WQC determination is issued within 30 days of the close of the comment period. Final WQC determinations are appealable within 30 days of issuance.
- ! WQC conditions can address water chemistry conditions, temperature, algal blooms, and usually one condition requiring best management practices.

## **UTAH'S SECTION 401 PROCESS - (Presented by William Moellmer)**

- ! Utah has no specific WQC application.
- ! Requests for only a few FERC projects have been received.
- ! WQC requests are coordinated by a committee (Natural Resources Coordinating Council) through the governor's office. The Utah Department of Natural Resources and other state agencies send comments to the governor's Office of Planning and Budget (OPB) to review completeness. The WQC is generated by the Division of Water Quality and is also forwarded to the OPB. The OPB then compiles all comments and the WQC and sends them to FERC.
- ! Utah does not issue WQC conditions, except for best management practices if instream work is involved

## **JOINT DISCUSSION OF INTEGRATING STATES' WQC/CZM PROCESSES AND THE FERC LICENSING PROCESS**

- ! Utah suggested that FERC send a letter to the states advising when they should have received a request for WQC by an applicant, including applications for amendment of license. This would avoid projects being licensed without a WQC because the applicant did not apply and the state was unaware that the project was being relicensed. Utah said it will review the license expiration dates for Utah projects as shown on FERC's website to determine when WQC requests are likely be submitted to the state (no later than 2 years prior to the project's expiration date). Montana suggested that FERC ensure all hydro project applicants request a WQC. Montana is not aware of which facilities are under FERC jurisdiction, and fears that small projects may be slipping through the process without a WQC. The Western States Water Council suggested that FERC could accommodate the states by providing a database on its website with the status of any WQC requests.
- ! Idaho and Alaska suggested moving the required NEPA scoping to the ICP stage to allow very early involvement by FERC staff. Montana suggested that FERC require the applicant to contact the state at the ICP stage. Montana finds that most applicants want a WQC issued before they submit supporting data whereas, DEQ needs the data prior to issuing a WQC. Montana also needs the data earlier in the process to comply with their

administrative rules for WQC processing. Large hydro projects in Montana generally require data equivalent to an EIS.

- ! Montana suggested that FERC do a better job of ensuring compliance with state conditions contained in a WQC. Most of Montana's conditions involve long-term agreements between the licensees and the DEQ, and the state believes that there needs to be an approach that will maintain the license agreements over the period of license because of the lapses that can occur during staff turnover and agency reorganizations. FERC staff advised that the state could write its condition to require that the licensee reports directly to the state. FERC staff further advised that guidance for writing conditions is found in an Interagency Task Force paper available at the FERC website
- ! Alaska suggested moving the WQC request date to the REA notice stage to ensure WQC applications have complete information and reduce the potential for the one-year time limit for the WQC to expire before the WQC can be reviewed for consistency with the ACMP and issued (the WQC may not be issued until after the ACMP review is concluded). FERC regulations require that the request must be submitted on or before the date the final application is filed with FERC. FERC would like to have the WQC/CZM determinations issued by the deadline of the REA notice, if an earlier issuance date is not possible.
- ! Idaho agreed it should review its TMDL schedule and, if possible, reprioritize it to first complete TMDL's for basins with upcoming relicenses. This would avoid any need to add a TMDL reopener in a WQC.
- ! FERC staff suggested eliminating, to the extent possible, any second request for additional information, and issuing SD2 and the REA notice at the same time. This would speed up the FERC process. REA notices and DEA's could be issued earlier, allowing WQC's/CZM's to be issued earlier.

**LIST OF ATTENDEES**  
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**Integrating State Processes**  
**June 4 and 5, 2002**  
**Salt Lake City, Utah**

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